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Tina Lu

A Right Without a Remedy Is No Right at All: a Case for Why AB 1844 Requires a Remedial Scheme and What It Might Be

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This note seeks to explore whether California intended to create a right or right of action for a plaintiff seeking to sue an employer for an AB 1844 violation, and if so, what remedies are available to the plaintiff. This note discusses several remedies that may be available: options include, but are not limited to, a discussion of the remedial scheme created by the Private Attorney General Act of 2004; a wrongful discharge claim in violation of public policy; or a civil penalty. Next, this note discusses whether or not the trifocal approach of the rights—right of action—remedy equation is the best test a court should use and advocates for an alternative analysis under Professor Zeigler's singular approach. Lastly, this note suggests a solution for the California courts to adopt in deciding a case arising under AB 1844.

I. INTRODUCTION

Social media usage is on the rise[1]. According to Nielsen's Social Media Report[2], users spend more time on social networks than any other site. Users on social media sites often post personal information about themselves on their social media accounts including their age, religion, or ethnic background.[3] For example,

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* J.D. Candidate, University of California, Hastings College of the Law, 2014; B.A., Political Science, University of California, Berkeley, 2008. The author thanks professor Michael Zamperini for his guidance, as well as the editors of the *Hastings Business Law Journal.*

1. Social media refers to the means of interactions among people in which they create, share, and exchange information and ideas in virtual communities and networks. Tony Ahlqvist, et al, *Social Media Roadmaps, Exploring the Futures Triggered by Social Media*, VTT TIEDOTTEITA RESEARCH NOTES 2454, 13 (2008), *available at* http://www.vtt.fi/inf/pdf/tiedotteet/2008/T2454.pdf.

2. NIELSEN, *State of the Media: The Social Media Report*, 1(2012), *available at* http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/The-Social-Media-Report-2012.pdf.

3. Mike Sachoff, *Social Network Users Posting Too Much Personal Information*, WEBPRONEWS (May 4, 2010), *available at* http://www.webpronews.com/social-network-users-

Consumer Reports found that forty-two percent of users on social media post their date of births in their profile.[4] When employers request an employee or applicant to divulge their social media passwords, this could allow the employer to access the personal information, and use it illegally in their decision to hire the applicant. California's new law, AB 1844,[5] prohibits an employer asking for such passwords in order to prevent potential illegal actions. This note seeks to explore whether California intended to create a right or right of action for a plaintiff seeking to sue an employer for an AB 1844 violation, and if so, what remedies are available to the plaintiff. This note discusses several remedies that may be available: options include, but are not limited to, a discussion of the remedial scheme created by the Private Attorney General Act of 2004; a wrongful discharge claim in violation of public policy; or a civil penalty. Next, this note discusses whether or not the trifocal approach of the rights—right of action—remedy equation is the best test a court should use and advocates for an alternative analysis under Professor Zeigler's singular approach.[6] Lastly, this note suggests a solution for the California courts to adopt in deciding a case arising under AB 1844.

II. BACKGROUND

Technology use for both personal and business purposes has increased dramatically in recent years.[7] The use of social media for communication through programs such as Facebook, Twitter, and LinkedIn has become commonplace.[8] In 2010, the number of worldwide registered users of Facebook reached one-half billion.[9] The personal use of social media can present problematic situations around issues of free speech, discrimination, harassment, and even termination,[10] especially as employers try to minimize the risk of hiring someone who lacks values incompatible with the company's goals by looking at employees and applicants' social media pages.[11]

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posting-too-much-personal-information-2010-05.

4. *Id.*

5. CAL. LAB. CODE § 980 (2013).

6. Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 69 (2001).

7. CAL. S. RULES COMM., 3D READING, AB 1844, at 3 (2012).

8. *Id.*

9. Carl A. Warns, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 1 (2011).

10. CAL. S. RULES COMM., 3D READING, AB 1844, at 3–4.

11. *A Social Media Trend We Don't "Like"*, L.A. Times, (Mar. 28, 2012), http://articles.latimes.com/2012/mar/28/opinion/la-ed-facebook-passwords-legislation-20120328.

In just a few short years, employers have gone well beyond just using the popular search engine, Google, to search for information on job applicants to learn more about their prospective employees than what is revealed in resumes or job interviews.[12] Although existing law protects employees and applicants against discrimination, and guarantees free speech in the workplace, before the enactment of AB 1844, nothing specifically addressed the issues that arise with the use of information obtained through social media sites.[13] For example, Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on race, gender, religion, and national origin.[14] For pre-employment purposes, an employer must make hiring decisions without regard to race, religion, or gender; however, a quick search on Facebook could give the employer this information making the employer liable for potential hiring discrimination if that decision was based on a protected classification. For an individual who is already employed, the National Labor Relations Act ("NLRA") prohibits employers from restricting the rights of employees to engage in concerted activities, such as discussing wages, and work conditions.[15] This could be problematic if employers are allowed to ask for the social media passwords, as this may deter employees from participating in concerted activities[16] in the social media context. One recent survey reveals that nearly eighty percent of individuals involved in hiring and recruiting use the Internet to investigate candidates,[17] and seventy percent of hiring and recruiting professionals in the United States have rejected a candidate based on data found online.[18]

It is illegal in California for an employer to discriminate against an employee or applicant on the basis of lawful conduct they engage in during nonworking hours away from the employment site.[19] As a result, in 2012, the California legislature passed AB 1844 which prohibits an employer from requiring or requesting an employee or

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12. Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 3 (2011).

13. CAL. S. RULES COMM., 3D READING, AB 1844, at 3.

14. 42 U.S.C. § 2000e-12 (2013). *See also* 29 C.F.R. § 1604.7 (2012) (regulating pre-employment inquiries as to sex); 29 C.F.R. § 1605.3 (2012) (regulating selection practices that discriminate on the basis of religion); 29 C.F.R. § 1606.6 (2012) (regulating selection practices that discriminate on the basis of national origin).

15. 29 U.S.C. § 157 (2013).

16. Employees may be discouraged from engaging in concerted activities using social media as a forum for discussing their work conditions and related issues if employers may monitor and discover such activity and discipline the employees for such action.

17. Warns, *supra* note 9, at 4.

18. *Id.* at 5.

19. CAL. LAB. CODE § 96(k) (2013).

applicant for employment to disclose a user name or password for the purpose of accessing personal social media or to access personal social media in the presence of the employer.[20] The bill also prohibits an employer from discharging or otherwise disciplining an employee or applicant for not complying with a request or demand by the employer in violation of AB 1844.[21] California is not alone; lawmakers in Maryland[22] and Illinois[23] passed similar legislation to address the issue of social media password privacy.

In considering AB 1844, the California Senate Rules Committee[24] based an employee's right to privacy with regard to his or her social media account password on the decision in *Pietrylo v. Hillstone Restaurant Group*.[25] In *Pietrylo*, two employees at Houston's Restaurant, Pietrylo and Marino, were members of a chat room called Spec-Tator in the social media site, MySpace, where other employees were also members by invitation to chat and discuss their work.[26] Some managers at Houston's accessed the Spec-Tator chat room by demanding and obtaining the MySpace password from a third employee, St. Jean.[27] Pietrylo and Marino sued after being fired from Houston's because they had created a private MySpace page that allowed fellow employees to vent about their workplace.[28] The jury ultimately found that St. Jean's consent to disclose his password was coerced,[29] and ruled in favor of Pietrylo and Marino.[30] *Pietrylo* involved a knowing and malicious forced disclosure of an employee's password,[31] making it a violation of the Stored Communications Act.[32] Going one step further, AB 1844 prevents casual or innocuous request for disclosure of an employee's password at the outset.

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20. CAL. S. RULES COMM., 3D READING, AB 1844, at 1.

21. *Id.*

22. S.B. 433, 430th Gen. Assemb., Reg. Sess. (Md. 2012); H.B. 864, 430th Gen. Assemb., Reg. Sess. (Md. 2012) (prohibiting an employer from requiring an employee to disclosure any username, password, or other means for accessing a personal account or service through an electronic communications device).

23. H.B. 3782, 98th Gen. Assemb., Reg. Sess. (Ill. 2012) (providing that it shall be unlawful for any employer to ask any prospective employee to provide any username, password, or other related account information in order to gain access to a social networking website where that prospective employee maintains an account or profile).

24. CAL. S. RULES COMM., 3D READING, AB 1844, at 5.

25. Pietrylo v. Hillstone Rest. Group, No. 06-5754, 2009 U.S. Dist. LEXIS 88702, at 7 (D. N.J. Sept. 25, 2009).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 18.

30. *Id.* at 21.

31. *Id.* at 2.

32. 18 U.S.C. § 2701 (2012).

However, even though AB 1844 states that an employer cannot ask for a password, it leaves the employee without recourse when an employer chooses to do so anyway. In fact, the bill specifically states that the Labor Commissioner, who is Chief of the Division of Labor Standards Enforcement ("DLSE"), is not required to investigate or determine any violation of this law.[33] A right without a remedy was said to be a "monstrous absurdity."[34] As a result, AB 1844 provides some kind of superficial protection for employees but a remedial scheme is missing when employees seek to enforce the statute's provision.

III. DID THE CALIFORNIA LEGISLATURE INTEND TO CONFER A RIGHT, RIGHT OF ACTION AND REMEDY FOR AB 1844?

When confronted with statutes such as AB 1844 where a remedial scheme is lacking, courts fill the void. The U.S. Supreme Court developed a criterion to determine whether a statutory provision should be judicially enforceable.[35] The Court announced that courts must determine if there is a right, imply a right of action, or provide a remedy.[36] The Court in *Cort v. Ash*[37] dealt with a federal statute, but the guidelines may be helpful in the state context as well. The first factor to determine if there is a right asks if the "plaintiff is one of the class for whose benefit the statute was enacted."[38] Second, to determine if there is an implied right of action, one should look for any indication of legislative intent to create or deny a right of action.[39] Finally, the court considers if implying such a remedy for the plaintiff is consistent with the underlying purpose of the legislative scheme.[40] As explained below, the *Cort* test has been modified to varying degrees by the Court's subsequent decisions, but the core inquiry remains.

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33. CAL. LAB. CODE § 980.

34. Kendall v. U.S., 37 U.S. 524, 624 (1938); *see also* Donald H. Zeigler, 76 WASH. L. REV. 67, 68 (2001).

35. *See* Davis v. Passman, 442 U.S. 228, 239 (1979).

36. Zeigler, *supra* note 6.

37. Cort v. Ash, 422 U.S. 66, 68–70 (1975).

38. *Id.* at 78.

39. *Id.*

40. *Id.*

A. IS A RIGHT CONFERRED?

The first *Cort* inquiry determines if the statute confers a right upon an aggrieved individual to sue privately in court. A statute confers a right as long as it was intended for the benefit of the class of person of which the plaintiff was a member, and the harm suffered was of a kind the statute generally was intended to prevent.[41] In *Golden State Transit Corp v. City of L.A.*,[42] the Court applied a three-part test to determine if a statute created an enforceable right. First, does violation of a statute create obligations binding on the government or it only expresses a congressional preference for certain kinds of treatment. Second, does plaintiff assert an interest that is not vague or amorphous? And third, does the provision in question meant to benefit the plaintiff?

In *Golden State Transit*, plaintiff, a taxicompany, alleged that the city interfered with the company's labor relations by conditioning the renewal of its franchise license on the settlement of a labor dispute. Plaintiff further alleged that this interference was compensable under the NLRA.[43] The Court agreed with plaintiff, stating that Congress did not pass the NLRA with only the interest of the public in mind; it was passed to create rights in both labor and management against one another, and not merely as against the employer.[44] *Golden State Transit* found that plaintiff was entitled to seek damages against respondent city under section 1983 of the Civil Rights Act. Therefore, the Court concluded that the NLRA implicitly confers certain rights for the plaintiff to bring a section 1983 suit.[45]

A violation of AB 1844 does not create explicit binding obligations on the government. According to the Legislative Counsel's Digest, "this bill provides that the Labor Commissioner is not required to investigate or determine any violation of a provision of this bill."[46] However, its legislative history shows a willingness to pass an enforcement statute;[47] it states that there is a need for this bill to protect employees against discrimination from information obtained through social media sites. Laws existing prior to AB 1844 did not specifically prohibit the use of information obtained through social media sites. AB 1844 can be seen as an extension of existing law, similar to Title VII of the Civil Rights Act or section 7 of the

41. RESTATEMENT (FIRST) OF TORTS § 286 (1934).
42. Golden State Transit Corp v. City of LA, 493 U.S. 103, 106–08 (1989).
43. *Id.* at 104–05.
44. *Id.* at 109.
45. *Id.*
46. CAL. LAB. CODE § 980.
47. CAL. S. RULES COMM., 3D READING, AB 1844, at 5.

NLRA that protects employees from discrimination or retaliation, and provides employees a cause of action to sue their employer. Therefore, AB 1844 is more than an expression of legislative preference to prevent discrimination, and thus satisfies the first prong of the *Golden State Transit* test.

As for prong two of the *Golden State Transit* test, an employee or applicant could cite to their interest in privacy or discrimination.[48] This interest in privacy protection, and against discrimination, is not vague or amorphous, because these are precisely the kinds of interest already protected under other statutes[49] but not extended to the social media context.

As for prong three of the test, whether the provision in question intends to benefit the plaintiff, AB 1844 is intended to benefit current employees and applicants, and not to protect the public in general. The Legislature Counsel Digest notes[50] specifically state that the goals of AB 1844 are to prohibit an employer's conduct against its employees, not prohibiting conduct against the public at large. Therefore, a right is conferred under AB 1844 to protect the interest of current employees and applicants regarding their social media passwords.

B. IS THERE A PRIVATE RIGHT OF ACTION?

The second *Cort* inquiry in determining whether in a statute the legislature intended to confer a private cause of action for an individual is to look at its legislative intent or history. The Court stated in *Thompson v. Thompson* that intent might appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.[51] In *Thompson*, a father sued under the Parental Kidnapping Prevention Act ("PKPA") to determine the validity of conflicting child custody decrees. Under the PKPA, states are required to afford full faith and credit to valid child custody determinations entered by a sister state's courts. The Court held however that the PKPA does not provide an implied private cause of action in federal court to determine which of two conflicting state custody decisions is valid.[52] The Court looked at the context in which the PKPA was enacted, and determined that its aim was to extend Full Faith and Credit to custody determinations to avoid forum shopping by plaintiffs who lost a custody battle in one state. Its intent

48. *See infra* section IV.
49. 42 U.S.C. § 2000; 29 U.S.C. § 157.
50. Assembly Bill No. 1844, Chapter 618, Sept. 27, 2012.
51. Thompson v. Thompson, 484 U.S. 174, 179 (1988).
52. *Id.* at 187.

was not to create an entirely new cause of action in a new jurisdiction.[53]

Thompson emphasized the importance of the legislative intent when determining if a private cause of action can be implied from a statute. Thus, the intent of the legislature is the ultimate issue, and unless the intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy does not exist.[54]

The legislative intent of AB 1844, found in its committee reports, was to further the goal of preventing discrimination or retaliation in the employment context by limiting an employer's access to employee information secured in social media sites.[55] The legislature reasoned that such information should also be accorded protection as employers may use this information to engage in prohibited discriminatory or retaliatory actions.[56]

California state cases have reached similar holdings. A violation of a state statute does not necessarily give rise to a private cause of action.[57] Instead, whether a party has a right to sue depends on whether the legislature has manifested intent to create such a private cause of action under the statute.[58] That legislative intent, if any, is revealed through the language of the statute and its legislative history.[59] In *Lu v. Hawaiian Gardens Casino*,[60] the California Supreme Court determined whether section 351 of the Labor Code provides a private cause of action. Section 351 provides that gratuities received by an employee belong to the employee and not to the employer.[61]

In *Lu*, a card dealer brought a class action against his employer, Hawaiian Gardens Casino, based on its mandatory tip pooling policy. The casino's policy required dealers to contribute 15 percent to 20 percent of their tips to a tip pool to be shared among other designated employees who provided service to casino patrons. The dealer

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53. *Thompson*, 484 U.S. at 183–84.

54. *Id.* at 179 (internal citation omitted).

55. CAL. S. RULES COMM., 3D READING, AB 1844, at 4.

56. *Id.*

57. Vikco Ins. Services Inc. v. Ohio Indem. Co., 70 Cal. App. 4th 55, 62 (Cal. Ct. App. 1999).

58. Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d. 287, 305 (1988).

59. *Id.* at 294–95.

60. Louie Hung Kwei Lu v. Hawaiian Gardens Casino, Inc., 50 Cal. 4th 592 (Cal. 2010).

61. CAL. LAB. CODE § 351 ("No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee or patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.").

alleged that this policy constituted a conversion of his tips and violated section 351.[62]

The court stated that it required clear language in the statute to expressly provide a private cause of action for any violation, or language stating that an employee may bring an action to recover any misappropriated gratuities.[63] The court concluded that the statutory language did not "unmistakably reveal a legislative intent to provide wronged employees a private right to sue."[64] Absent such express language, the court then looked at the legislative history of section 351, and found that the legislature's goal was to prevent an employer from taking any part of an employee's gratuity by crediting an employee's tips against any wages earned, and not to provide extra compensation to the employee.[65] Therefore, the court held that section 351 did not provide a private right of action.

Section 351 of the Labor Code can be distinguished from AB 1844, because a violation of section 351 means the employer is guilty of a misdemeanor, and is subject to a fine and/or imprisonment.[66] Thus, a mechanism exists to assure compliance. Moreover, the Department of Industrial Relations is specifically charged with enforcing section 351.[67] AB 1844 has no such enforcement provision. As the language stands now, it appears that a violation of AB 1844 will bring no consequences. In enacting AB 1844, the legislature was clear that an employer should not require or request an employee or applicant his or her social media passwords. Not providing a civil or criminal penalty for the employer or an explicit private right of action for the employee or applicant undercuts legislative intent since an employer will have no incentive to comply with AB 1844. Therefore, in order to be effective, AB 1844 should be interpreted as providing a private cause of action for an employee or applicant.

C. HOW TO DETERMINE AN APPROPRIATE REMEDY?

The last *Cort* inquiry is to determine what the appropriate remedy is if a right and private right of action can be inferred from the statute. The Court in *Franklin v. Gwinnett County Public Schools*

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62. *Lu*, 50 Cal. 4th at 595.

63. *Id.* at 597 (Such express language includes, "A person is liable for a cause of action for sexual harassment when a plaintiff proves certain elements," "Nothing in this article shall limit the right for any wage claimant to sue directly . . . for any wages or penalty due him under this article," or "Any person injured by a violation of this section may bring an action for the recovery of damages, equitable relief, and reasonable attorney's fees and costs.").

64. *Id.* at 598.

65. *Id.* at 600.

66. CAL. LAB. CODE § 354.

67. *Id.* at § 355.

stated that once a right and a cause of action are in place, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise."[68] Plaintiff in *Franklin* sued under Title IX of the Education Amendments of 1972 providing that, "no person shall . . . on the basis of sex, be excluded from participation . . . or be subjected to discrimination under any education program . . . receiving Federal financial assistance."[69] The plaintiff alleged that a high school teacher subjected her to continual sexual harassment, and that other teachers and administrators knew about this conduct and did nothing.[70] The offending teacher resigned on the condition that the matter be dropped and the school close its investigation.[71] The Court found nothing in the legislative history of Title IX to indicate that Congress would not want a damage remedy for violation of Title IX. In holding so, the Court confirmed that if a right of action exists to enforce a right and the legislature is silent on the question of remedies, a court might order any appropriate relief.[72]

Similarly, AB 1844 does not include a remedial scheme. The statute specifically provides that the Labor Commissioner is not required to investigate or determine any violation of this act.[73] If a statute does not require an agency or the government to act on behalf of an aggrieved individual suing under the statute, then the individual may sue in court and the judge may apply the gamut of remedies traditionally available.

IV. REMEDIES AVAILABLE FOR OTHER LABOR CODE VIOLATIONS

Remedies are an important part of any statute. If the legislature went through the trouble of creating and passing a piece of legislation, it only makes sense that it envisioned some sort of consequence for a violation of it, otherwise, a right without a remedy truly is a "monstrous absurdity."[74]

68. Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 66 (1992).
69. 20 U.S.C. § 1681(a) (2012).
70. *Franklin*, 503 U.S. at 64.
71. *Id.*
72. *Id.* at 69.
73. CAL. LAB. CODE § 980 (2013).
74. Kendall v. U.S., 37 U.S. 524, 624 (1938); *see also* Zeigler, *supra* note 6, at 68 (2001).

A. REMEDIES UNDER THE PRIVATE ATTORNEY GENERAL ACT OF 2004

To improve the enforcement of the labor laws, in 2004 the California Legislature enacted Labor Code sections 2698 et. seq., known as The Private Attorney General Act ("PAGA"). Under PAGA, aggrieved employees can step into the shoes of the enforcement agency,[75] acting as private Attorney General, and file a lawsuit in the public interest to recover civil penalties for certain Labor Code violations. PAGA grew out of the inability of the Labor Commission's enforcement budget to keep pace with growth in the economy, thus authorizing employees to maintain private and class actions for certain Labor Code violations.

Sections 2698 and 2699 assign new civil penalties to the many substantive Labor Code provisions that previously did not carry penalties. PAGA includes a list of numerous Labor Code sections that may not contain a remedial scheme, and provides a catchall remedial scheme for these violations. Collecting civil penalties under the PAGA benefits both the California Labor and Workforce Development Agency ("LWDA") and employees, because 75 percent of the recovered penalties go to the state and 25 percent to the employee who brought the PAGA claim.

Labor Code section 1194 exemplifies how PAGA changed the way workers may adjudicate their rights regarding the payment of minimum wage. Existing law provided that employers that fail to pay minimum wage are subject to penalties of $50 per pay period for each affected employee for the first violation, and $250 for succeeding violations. Previously, the LWDA was responsible for assessing and collecting these types of penalties, and the labor commissioner was the only entity that could bring actions for civil penalties. Under PAGA, a plaintiff may now pursue a case against the employer and obtain recovery.

PAGA has four major provisions.[76] First, for substantive Labor Code sections that at the time of their enactment carried no civil penalties, PAGA creates a formula for assessing penalties: If a person or company does not employ any "workers,"[77] then the civil penalty is $500 per violation. If the person or company employs one or more employees, then the civil penalty is $100 per employee per pay period

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75. CAL. LAB. CODE § 98.6 (explaining that a violation of a wage and hour statute can be brought before the DLSE).

76. *Id.* at §§ 2698 et. seq.

77. Some employers may employ workers on a contingent basis (i.e., part time) and are not treated as "workers" under certain employee protection status such as the Fair Labor Standards Act.

for the initial violation, and $200 per employee per pay period for the second or subsequent violations.[78] Second, an aggrieved employee may recover the civil penalty only through a civil action filed on behalf of him or herself, or other current or former employees. Any employee who prevails is entitled to an award of reasonable attorney fees and costs.[79] Third, an aggrieved employee may not maintain a private right of action to recover civil penalties if the Labor Department cites the employer for a Labor Code violation and initiates proceedings to collect the applicable penalties.[80] Finally, the court will distribute civil penalties recovered by aggrieved workers as follows: 50 percent to the state general fund, 25 percent to the Labor and Workforce Development Agency and 25 percent to the aggrieved workers.[81]

PAGA is not popular with employers, because employees only have to prove a violation, and do not have to show that they suffered actual harm from the employer's violation. As a result, some practitioners argue that the statute encourages employees to sue over insignificant technical violations that could amount to millions of dollars in penalties for a single employer.[82]

Most of the code provisions protected under PAGA are related to wage and hour, whistle blowers, work place injuries and illnesses; PAGA also prohibits retaliation or discrimination against employees who report unsafe conditions and other Labor Code violations that require an employer to cure the violation. The last category of "other" Labor Code violations where PAGA provides penalties includes section 432.2 where a private employer cannot require a polygraph test for an employee or applicant, and section 432.7 where an employer cannot ask about arrests that did not result in convictions. AB 1844 is similar to these Code sections, because it prohibits an employer from seeking something from an applicant or employee due to the privacy interest of the applicant or employee.

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78. Michael D. Singer, *New Law Allows Employees to Sue for Labor Code Violations*, DAILY JOURNAL (Oct. 28, 2003), *available at* http://ckslaw.com/pdf/NewLaw.pdf.

79. *Id.*

80. *Id.*

81. *Id.*

82. Leonora M. Schloss & Cari A. Cohorn, *Assessing the Amended Labor Code Private Attorneys General Act*, L.A. LAWYER, (Feb. 2006), at 13. (For example, the chemical company Amgen, which employs 6000 workers, was sued for $170 million for primarily technical violations. Specifically, the suit alleged Amgen violated a requirement that employers file with the Division of Labor Standards Enforcement ("DLSE") a copy of their employment applications if employees are compelled to sign them. Amgen also allegedly violated the law by posting a statement of rights for whistle blowers that was printed using a type size that was smaller than 16-point type. The fact that the company posted the statement was insufficient for the employees who sued over the small size of the font.). Umbrasas v. Amgen, Inc., No. SCO 38844, 2006 WL 1173421 at *4 (Cal. Ct. App May 4, 2006).

The California Court of Appeal in *Starbucks Corporation v. Superior Court* affirmed that individuals might sue, and recover actual damages or statutory penalties for section 432.7 violations due to the privacy interest of the employee.[83] Under sections 432.2 and 432.7, the employee or applicant may bring an action to recover actual damages or $200.00, whichever is greater, and actual attorney's fees.[84] Like section 432.7 or 432.2, where an employee's privacy interest is protected, AB 1844 should also be included in PAGA's remedial scheme allowing an applicant or employee to file suit against an employer for violation of AB 1844, and be provided with a remedial scheme that AB 1844 lacks due to the similar privacy interest at stake.

B. BASING A CAUSE OF ACTION AS A VIOLATION OF PUBLIC POLICY

Another potential way for an applicant or employee to bring suit under AB 1844 is to state a cause of action for wrongful termination in violation of fundamental public policy.[85] The California Court of Appeal in *Davis v. Consolidated Freightways* held that Labor Code section 432.2 could be a source of "fundamental," "substantial" or "well-established" public policy.[86] Section 432.2 prohibits an employer from requiring any employee to take a polygraph test as a condition of employment or continued employment. Plaintiff in *Davis* alleged that written notice is required before a polygraph test is administered, and that no such notice was given to him.[87] While the court ultimately dismissed the case on other grounds, the court did acknowledge, albeit implicitly, that section 432.2 may be used to allege a cause of action of wrongful termination in violation of public policy.[88] The remedies available in this private cause of action are those generally available under tort law. Because of the similarities in the privacy interest that section 432.2 and AB 1844 aim to protect, and the public interest found in both statutes, a wrongful termination

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83. Starbucks Corp. v. Superior Court, 194 Cal. App. 4th 820, 828 (2011).

84. CAL. LAB. CODE § 432.2; 432.7.

85. Foley v. Interactive Data Corp., 47 Cal. 3d. 654, 666–67 (1988). Note that wrongful discharge in violation of public policy would only apply for already employed workers who were subsequently discharged for failure to provide their social media passwords, and does not apply to applicants or prospective employees.

86. Davis v. Consolidated Freightways, 29 Cal. App. 4th 354, 369–70 (1994).

87. *Id.* at 370.

88. *Id.* (explaining that "To the extent plaintiff's cause of action for wrongful termination in violation of public policy rests on Labor Code section 432.2 . . . plaintiff failed to raise a triable issue of fact on that [because plaintiff declined to take the polygraph test and none was ever administered]).

in violation of public policy cause of action should also be available for AB 1844.

C. PROVIDE A CIVIL PENALTY FOR VIOLATION OF AB 1844

A civil penalty is a monetary fine that is designed to compensate for harm. It is not designed to punish the person for whom the penalty is imposed; instead it is designed to make the party who was damaged or injured whole. Prior to the enactment of PAGA, civil penalties could only be assessed by state agencies.[89] However, some Labor Code provisions provided that plaintiffs could recover statutory penalties through private actions. For example, Labor Code Section 203 states that a terminated employee whose wages are not paid at the time of discharge may recover a statutory penalty equal to the employee's daily wages for each day, up to 30 days, that the payment is delayed. In addition, Section 256 authorizes the Labor Commissioner to assess civil penalties for the same violation.

The California Court of Appeal in *Caliber Bodyworks, Inc. v. Superior Court*[90] discussed the civil penalties PAGA added to certain Labor Code sections allowing an individual plaintiff instead of a state agency to sue for civil penalties. PAGA establishes a default penalty and a private right of action for an aggrieved employee to bring a civil action to enforce those provisions, subject to the procedures in section 2699.3.[91] As the court in *Caliber Bodyworks* discussed, the same procedural requirements also could be required before an employee is allowed to sue for civil penalties. The procedural history of PAGA demonstrates that the procedural requirement, later added as an amendment to PAGA, was a compromise between employers and employees by allowing the LWDA to act first on more "serious violations" such as wage and hour violations, and give employers an opportunity to cure less serious violations.[92] Therefore, it is possible for the judiciary to issue a civil penalty similar to that found in PAGA to an employer in violation of AB 1844.

PAGA has not been amended to include any non-listed statutes; therefore, the best course of action is for a court to simply follow the procedures in issuing a remedy found in PAGA when dealing with similar, non-listed statutes added to the Labor Code subsequent to PAGA's passage.[93]

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89. Schloss & Cohorn, *supra* note 83, at 16.

90. Caliber Bodyworks, Inc., v. Superior Court, 134 Cal. App. 4th 365 (2005).

91. *Id.* at 375.

92. *Id.*

93. There have been no published cases that allow PAGA to be judicially extended or limit PAGA's reach to its listed statutes.

D. DONALD ZEIGLER'S SOLUTION – CONSOLIDATE THE RIGHTS, RIGHT OF ACTION, AND REMEDIES TRIFOCAL APPROACH INTO A SINGLE APPROACH

Professor Donald Zeigler of New York Law School published an article in 2001[94] advocating for a single inquiry of rights, rights of actions and remedies, because he believed they are interrelated conceptually and practically.[95] A right without a remedy is not a legal right; it is merely a hope or a wish.[96] For example, a decision about a cause of action directly affects both rights and remedies. A cause of action connects a right and a remedy, and if one has no cause of action, one has no right and no remedy.[97]

Professor Zeigler then laid out the problems caused by the Court's traditional separation of the rights, right of action and remedies equation. "By focusing on only one part of the equation, the Court does not acknowledge the impact of its decisions on the other parts."[98] By separating the inquiry, sometimes the Court disguises what it is doing.[99] For example, in *Wilder v. Virginia Hospital Association*,[100] a Virginia health care provider brought a section 1983[101] suit against state officials claiming that Virginia's reimbursement plan violated a provision of the federal Medicaid Act requiring payment rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. The Court in *Wilder* followed the test articulated in *Golden State*,[102] namely, whether the legislature intended the provision to benefit someone like the plaintiff, whether it is mandatory, (as opposed to merely a congressional preference), and whether it is too vague and amorphous for judicial enforcement. The Court further found that the test is quite similar to that used in *Cort v. Ash*.[103] Whether plaintiffs are the intended beneficiaries of the statute is similar to the first *Cort* inquiry. In *Wilder*, health care providers were the intended beneficiaries of the provision requiring reasonable and adequate reimbursement rates. Whether the provision is mandatory or merely reflects a congressional preference overlaps the second *Cort* inquiry: Is there any indication of legislative intent either to

94. Zeigler, *supra* note 6, at 69.
95. *Id.* at 105.
96. *Id.*
97. *Id.* at 108.
98. *Id.* at 109.
99. *Id.* at 112.
100. Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 502–04 (1990).
101. 42 U.S.C. § 1983 (2012).
102. Golden State, 493 U.S. 103.
103. *Cort*, 422 U.S. 66.

create a private remedy or to deny one?[104] Finally, whether a private remedy was foreclosed by the existence of a comprehensive enforcement scheme overlaps the third *Cort* question: Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?[105] *Wilder* noted that the Medicaid Act contains few enforcement provisions; the Secretary of Health and Human Services can withhold approval of state plans or withhold federal funds from states whose plans do not comply with the Act.[106] Although *Wilder* did not address it, the existence of a private remedy is probably necessary to effectuate the underlying congressional purpose to require states to reimburse health care providers at reasonable and adequate rates. Thus, although the Court purported to address only whether the statute confers a right and whether the private remedy the plaintiff sought was foreclosed by the existence of a comprehensive remedial scheme, its discussion parallels the *Cort v. Ash* analysis.[107]

Zeigler believes that this separate inquiry leads the Court to misstate what it is doing.[108] For example, in *Gebser v. Lago Vista Independent School District*[109] and *Davis v. Monroe County Board of Education*,[110] two Title IX sexual harassment decisions, the Court purports to delimit the remedy that a student can obtain from a school district, but in fact also circumscribes students' rights and rights of action under Title IX.[111] Students do not have a general right to be free of sexual harassment at school, because the Court imposes several conditions on recovery. *Gebser* holds that a student may not recover damages from a school district for sexual harassment by a teacher unless a school district official with authority to intervene has actual notice of the teacher's misconduct and does nothing.[112] *Davis* also imposes an "actual notice-deliberate indifference" condition on recovery for harassment.[113] If students have no right, and no remedy, then Title IX's implied right of action is of no use.[114] Because the decisions in *Gebser* and *Davis* so plainly affect students' rights, and rights of action, it is very misleading for

104. *Cort*, 422 U.S. at 78.
105. *Id.* at 80.
106. *Wilder*, 496 U.S. at 522.
107. Zeigler, *supra* note 6, at 114.
108. *Id.*
109. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).
110. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999).
111. 20 U.S.C. §§ 1961 et seq. (2012).
112. Gebser, 524 U.S. at 290–91.
113. Davis, 422 U.S. at 633, 650.
114. Gebser, 524 U.S. at 278–79.

the Court to contend that it is only addressing the scope of the damage remedy.

The separate criteria developed by the Court for assessing each element are not sufficient to answer the overarching question of whether the statutory provision on which a plaintiff relies creates the rights and duties claimed, and entitles the plaintiff to the particular remedy sought. Instead, Zeigler advocates for a different approach. In place of the three-part test, a single, integrated test should be used. This new test is more of an analytic process than a set of fixed criteria. The test has a process whereby the court will look at the language of the statute, and the overall statutory context. Courts routinely begin with the statutory language when interpreting a statute.[115] The Court's inquiry here will focus on several questions: What does the provision say, and is there a clear and logical fit between the language, and the defendant's conduct? Does it expressly or specifically prohibit the defendant from doing what he has done or require him to do something he has failed to do?[116] In addition, does the provision appear to have been enacted to protect someone like the plaintiff? Does the language of the statute confer rights directly on the class of persons that includes the plaintiff, or does it only create duties on the part of persons for the benefit of the public at large? This may sound similar to the first *Cort* criteria ("Is the plaintiff one of the class for whose especial benefit the statute was enacted?"), but *Cort* is too restrictive, because the use of the word "especial" suggests that a statute cannot confer enforceable rights on several groups of people in the same statutory provision.[117] The legislature can confer rights of primary and secondary importance in one provision, and still intend that they all be enforced. Thus, even if plaintiff is part of the class for whose secondary benefit the statute was enacted, it will disqualify him from enforcing the provision under *Cort.* With Zeigler's approach, this plaintiff may still benefit from the statute. Admittedly, Zeigler himself recognizes that drawing the line of which class or classes the legislature intended to benefit (whether it is the primary, secondary or tertiary) could be problematic.[118]

Massachusetts Mutual Life Insurance Company v. Russell[119] illustrates the difficulty in drawing such lines. In *Russell,* plaintiff was a beneficiary under two employee benefit plans administered by Massachusetts Mutual. She alleged that the fiduciaries administering

115. *See, e.g.*, W. Va. Univ. Hosp., v. Casey, 499 U.S. 83, 98 (1991).

116. Zeigler, *supra* note 6, at 127.

117. *Id.*

118. *Id.* at 128. *See* Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985); (stating that the court should look to the overall statutory context and not just the plain language).

119. *Mass. Mutual Life Ins. Co.*, 473 U.S. 134.

the plans improperly cut off her benefits for a back ailment, and violated federal regulations by taking 132 days to process her claim.[120] Although her benefits were restored, she sued for financial losses suffered because her disabled husband was forced to cash out his retirement plan to tide them over.[121] The court of appeals held that section 409(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") entitled plaintiff to relief. The U.S. Supreme Court, however, read section 409(a) differently. The Court pointed out that section 409(a) only requires a fiduciary that breaches its duty to make good any losses to the plan resulting from such breach.[122] It does not make the fiduciary liable to individual beneficiaries.[123] However, section 409(a) is intended to benefit plan beneficiaries. The purpose of section 409(a) is to ensure the plan remains financially sound, and its assets are not stolen so that money is available to the plan's beneficiaries. Thus, in writing section 409(a), Congress intended to benefit the group of which plaintiff was a member, even if only in a derivative or secondary way. Arguably then, the plaintiff in *Russell* should have been allowed to sue under section 409(a).

The second aspect of Zeigler's approach looks at the overall statutory context. If it is unclear whether the language of the provision that a plaintiff relies on entitles the plaintiff to the particular remedy sought, a court should broaden the inquiry beyond that provision.[124] A court should look at the overall structure and purpose of the statute for guidance. Several questions are pertinent: Why did the legislature enact this statute? What was it trying to accomplish? What problem was the legislature responding to, and how did it seek to cure or correct it? By answering these questions, a court can provide a context for interpreting the provision. It can determine whether the remedy sought would be consistent with the underlying purposes of the statute. The Supreme Court often considers statutory structure and purpose in deciding whether a statutory provision confers a right.[125] The Court also routinely relies on overall statutory context in deciding whether a statute should be read to authorize the remedy the plaintiff seeks.[126] Reliance on these background understandings is a necessary and legitimate device for construing unclear or ambiguous statutory provisions.

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120. *Mass. Mutual Life Ins. Co.*, 473 U.S. at 136–37.
121. *Id.* at 137.
122. *Id.* at 139.
123. *Id.* at 140.
124. *Id.* at 133.
125. *See, e.g.*, Musick, Peeler & Garrett v. Employers Insurance of Wausau, 508 U.S. 286 (1993).
126. *See, e.g.*, Davis, *supra* note 86; Gebser, *supra* note 109.

Applying Zeigler's approach to AB 1844, one should look to the language of AB 1844 and if the language is unclear whether or not plaintiff is entitled to the remedy, then one should look to the overall statutory context. Here, AB 1844 says, "an employer shall not discharge, discipline . . . or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates this section."[127] However, the language goes on to say, "[AB 1844] does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law."[128] It is unclear what remedy, if any, the language of AB 1844 suggests. Since the language is unclear, we then turn to the overall statutory context. The language does specifically prohibit an employer from requiring or requesting an employee or applicant for employment to "disclose a username or password for the purpose of accessing personal social media."[129] The statute was enacted with employees and applicants in mind as the statute was intended to protect their privacy interests.[130] The statute was not intended to benefit the public at large; it was intended to benefit the employees and applicants.[131] Therefore, the statutory context does suggest that the legislature intended to confer a right, right of action and give plaintiff a remedy under AB 1844.[132]

V. PROPOSED REMEDIES FOR AB 1844

AB 1844 is not listed as a statute specifically to provide a private cause of action under PAGA because PAGA was enacted in 2004 while AB 1844 became effective in 2013. Had AB 1844 been enacted first, it is conceivable that AB 1844's provisions would be included in the statute as well. Also, the courts could adopt the civil penalty scheme found in PAGA for violations arising from AB 1844[133] either in lieu of a private right of action or in addition to it. Another solution proposed above is to create a public policy exception with AB 1844 whereby plaintiffs could sue their employers for wrongful discharge in violation of public policy if employers were to demand plaintiffs for their social media passwords. This scheme is probably

127. CAL. LAB. CODE § 980.

128. *Id.*

129. *Id.*

130. *See generally* CAL. S. RULES COMM., 3D READING, AB 1844.

131. CAL. LAB. CODE § 980.

132. Zeigler argues that once a statute is intended to give plaintiff a remedy, he presumes the availability of all appropriate remedies, unless the legislature has expressly indicated otherwise. Zeigler, *supra* note 6, at 99.

133. CAL. LAB. CODE §§ 2698 et seq.

not the best solution, because suing for a wrongful discharge would not apply to prospective employees (whom obviously had not been discharged), whom the legislature also intended to protect. Prospective employees would not suffer an adverse employment action unlike employees; therefore, this cause of action may not protect them. After finding that AB 1844 does create a right, and right of action following the Zeigler approach, a court is free to choose a remedial scheme discussed above that best fits the facts in the particular case before them.

VI. CONCLUSION

As it stands, AB 1844 prohibits employers from engaging in certain activity, but the statute lacks any recourse or consequences when an employer does engage in the prohibited activity. However, because AB 1844 protects privacy interests in the work place, employees should be allowed to sue for violations of AB 1844. When confronted with plaintiffs suing under AB 1844, California courts should interpret the statute as creating a right, and right of action for the plaintiffs, and follow the remedial scheme from PAGA as if AB 1844 is listed, because of the similarities of the statutes in PAGA to AB 1844.